

## Carriers brace for opioid claims as US court case looms

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Casualty carriers are checking exposures to the US opioid crisis as lawyers warn a key federal court case could spark major (re)insurance payouts.

In a centralised set of cases brought by state governments against drug manufacturers and distributors in the Northern District of Ohio, a federal judge has demanded details of the defendants' insurance coverage by 30 April in an attempt to bypass years of litigation and move towards settlements as soon as possible.

One reinsurance underwriting source told The Insurance Insider that primary insurers have already received claims from drug manufacturers, pharmacies and distributors facing compensation bills. Although many of these claims have been denied, there are fears of pushback from insureds and potential legal action over coverage.

Another underwriting source told this publication their carrier had conducted an internal review for senior management to check its exposure to the crisis.

A third underwriter said large US pharmacy chains typically buy product and general liability insurance in London, which meant there was "quite a lot of exposure" among Lloyd's syndicates.

A broker confirmed to this publication that Lloyd's reinsurers are now regularly being asked about their exposure as concerns brew.

It is estimated that 150 people in the US die every day as a result of opioid abuse, usually having been prescribed the drugs following an injury and then becoming addicted.

Various state governments have taken drug manufacturers, pharmacies and distributors to court over the last 15 years. They allege the defendants either failed to adequately label the drugs as highly addictive and unsuitable for long-term use, or that sellers or distributors failed to flag suspiciously large orders of the painkillers.

Defendants have attempted to claim on their insurance for payouts and legal costs.

While a number of these cases are progressing through state courts, one multi-district litigation (MDL) in the Cleveland federal court is particular cause for concern.

MDLs are consolidations of a large number of similar cases. They are created to reduce costs and enhance efficiency.

The National Prescription Opiate Litigation, an MDL that brings together more than 400 cases, was created in December and assigned to Judge Dan Polster of the Northern District of Ohio. In January, Judge Polster took the highly unusual move of informing lawyers that legal norms such as discovery would be dispensed with and ordered them to prepare for settlement discussions immediately.

Adam Fleischer, partner at law firm BatesCarey, said: "Courts always want to move cases towards settlement but they recognise that before that can happen the case has to proceed through a typical litigation process. In this case... the court has switched the cart and the horse."

As part of the process, the judge ordered the defendants in all of the cases to disclose to the court any insurance policies they think may be relevant by 30 April.

"It's a very unusual approach, because all of that ignores the fact that some of these defendants may have defences [and] some of the insurance may not provide coverage. But the court has articulated that right now, in America, there are over 100 people dying every day from this crisis and the court wants to get to the bottom of the dispute to see if there's any way to resolve it before litigating it," said Fleischer.

Once defendants submit their coverages, it will become clearer which lines may be exposed, but lawyers say general liability, directors' and officers', product liability and even some technology policies may be brought into play.

Chris Carroll, a partner at Kennedys, said: "The numbers are going to be staggering. Because of that, one would expect that there will be a more probing search of insurance."

BatesCarey has set up the Opioid Coverage Task Force, which monitors the MDL and other state court cases and works with (re)insurer clients to understand their exposures. Fleischer, who is chair of the body, said the majority of claims so far have been on general liability policies.

Insurers have attempted to reject these claims, first on the grounds that misleading marketing of the drugs was intentional. They also argue that plaintiffs are claiming for the costs associated with responding to the epidemic – from additional policing to treatment for addicts – and that this does not satisfy the definition of bodily injury. However, Fleischer said in a number of cases, the insureds have disputed this argument

Many policies will also have exemptions for product claims or government lawsuits, Fleischer said.

However, one casualty source said some claim notices they had seen dated back to the 1984 underwriting year, before the exemptions common in modern policies were added.

The source added that their carrier feared retrospective action from the government via the courts that may force them to pay out on policies such as general liability, even if they dispute the terms of coverage.

They cited the Amtrak train crash in Philadelphia in 2015 as an example of the way insurers can be caught out by state intervention. A number of carriers insured Amtrak above a statutory liability limit of \$200mn, but when this was raised retroactively, many insurers were caught short.

“We’re getting claim notices, and they’re getting denied, but we’ll see where it all goes. It’s going to be big. It’s a big problem and someone’s got to pay the bill,” said the source.

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